Supreme Court, U.S.
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No. 00-512

In the
Supreme Court of the United States

PATRICIA L. LARSEN AND DONALD LARSEN
Petitioner,

v.

MAYO FOUNDATION, MAYO CLINIC, AND MAYO MEDICAL CENTER
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LEO G. STERN
FREDRIKSON & BYRON, P.A.
1100 International Centre
900 Second Avenue South
Minneapolis, MN 55402
(612) 347-7000
Attorneys for Respondents

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Under Erie principles in a diversity action, does state substantive law, including state law that identifies when an action is commenced for statute of limitation purposes, control the parties' rights?

2. Does Rule 4(d) of the Federal Rules of Civil Procedure, the so-called service by mail rule, require return of the acknowledgement of service form for service to be effective?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

I. Petitioners Did Not Commence Their Action Within The Limitations Period.

For causes of action based on diversity jurisdiction, state law controls the parties' substantive rights. Erie v. Tompkins, 304 U.S. 64 (1938). As such, in Walker v. Armco Steel Corp., 446 U.S. 740 (1980), this Court, faced with the identical issue presented here, determined that the time when an action is commenced for statute of limitations purposes is set by state law:

> There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants. The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and Erie and its progeny do no permit it.

446 U.S. at 753. Thus, Rule 3 of the Federal Rules of Civil Procedure, which provides that an action is commenced by filing a complaint, "governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations." All circuits

have followed Walker's holding or principles.[1] Walker's analysis is logical and compelling. It need not be re-examined.

Here, Rule 3.01 of the Minnesota Rules of Civil Procedure controls as to when suit is commenced and, therefore, the statute of limitations tolled. Specifically, Rule 3.01 provides that a civil action is "commenced" against a defendant:

> (a) when the summons is served upon that defendant, or
>
> (b) at the date of acknowledgement of service if service is made by mail, or
>
> (c) when the summons is delivered to the sheriff in the county where the defendant resides for service; but such delivery shall be ineffectual unless within 60 days thereafter the summons

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[1] See, e.g., Daigle v. Main Med. Ctr., 14 F.3d 684, 689 (1st Cir. 1994); South v. Saab Cars U.S.A., Inc., 28 F.3d 9, 12 fn.2 (2d Cir. 1994); Patterson v. American Bosch Corp., 914 F.2d 384, 387 (3d Cir. 1990); Wade v. Danek Medical, Inc., 182 F.3d 281 (4th Cir. 1999); Mullen v. Sears, Roebuck, and Co., 887 F.2d 615 (5th Cir. 1989); Eades v. Clark Distributing Co., 70 F.3d 441 (6th Cir. 1995); S. A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist., 60 F.3d 305 (7th Cir.), cert. denied 516 U.S. 1010 (1995); Alonzo v. ACF Property Management, Inc., 643 F.2d 578 (9th Cir. 1981); Jenkins v. City of Topeka, 136 F.3d 1274 (10th Cir. 1998); Cambridge Mutual Fire Ins. Co. v. City of Claxton, Ga., 780 F.2d 1230 (11th Cir. 1983). As to the Eighth Circuit cases following Walker, see Alholm v. American S.S. Co., 144 F.3d 1172, 1175 (8th Cir. 1998) (because Minnesota law governed medical malpractice action, state statute of limitations and commencement rules applied); Anderson v. Unisys Corp., 47 F.3d 302, 309 (8th Cir.), cert. denied, 516 U.S. 913 (1995) (state law claims barred by statute of limitations because state commencement rule applied); Appletree Square I v. W.R. Grace & Co., 29 F.3d 1283,1286 (8th Cir. 1994) (action brought pursuant to court's diversity jurisdiction was not commenced until defendant was served); Gully v. Mayo Foundation, 886 F.2d 161, 164 (8th Cir. 1989) ("Under Minnesota law, which applies in [a] diversity action, a lawsuit is commenced when service of process is effected upon the defendant.").

> is actually served on that defendant or the first publication thereof is made.

Minn. R. Civ. P. 3.01.

This commencement of suit provision is not a provision within the statute of limitations. As such, petitioners assert that since the commencement of suit provision is not part of the statute of limitations, it does not control a diversity action. Petitioners rely solely on Prashar v. Volkswagen of America, Inc., 480 F.2d 947 (8th Cir. 1973), as support for the proposition.

However, petitioners overlook one important fact: Prashar is no longer good authority. Its reasoning has been repudiated by both the Supreme Court in Walker, 446 U.S. at 752, and the Eighth Circuit in Fischer v. Iowa Mold Tooling Co., 690 F.2d 155 (8th Cir. 1982).

The Walker Court rejected the contention that a service provision was not an integral part of a statute of limitations even though it was not a provision of the statute of limitations, finding instead that a "service rule must be considered part and parcel of the statute of limitations[:]"

> The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim. A requirement of actual service promotes both of those functions of the statute. It is these policy aspects which make the service requirement an "integral" part of the statute of limitations . . . .

Id. at 751-52.

In Fischer, the Eighth Circuit also rejected the arguments made here by petitioners and made clear that Prashar is no longer good law. The court stated that "Prashar clearly supports the plaintiff's position [and] would, in fact carry the day but for the Supreme Court's intervening unanimous decision in Walker v. Armco Steel Corp., 446 U.S. 740, . . . Walker has laid to rest the notion that Rule 3 can ever be used to toll a state statute of limitations in a diversity case arising under state law." Fischer, 690 F.2d at 157. Petitioners here cannot hide from such an unequivocal holding.

Petitioners represent to this Court that the circuits are in conflict as to the issue of when diversity actions are commenced. Petitioners are wrong. All circuits follow the principles set forth in Walker. See footnote 1 supra. None is at odds with it. Neither the case that petitioners cite from the Seventh Circuit, Lewellen v. Morley, 875 F.2d 118 (7th Cir. 1989), or that cited from the Tenth Circuit, Kitchens v. Bryan County National Bank, 825 F.2d 248 (10th Cir. 1987), contradict the Erie v. Tompkins mandated requirements as set out in Walker, that in diversity actions state substantive law, including its statute of limitations, applies. Lewellen was not even based on diversity jurisdiction; it involved a federal question. See 875 F.2d at 119. Kitchens merely held that the procedure for commencing an action is determined by federal law. See 825 F.2d at 255.

Petitioners ignore the distinction between when suit is commenced and the procedure for commencing suit. While state law must be viewed to determine when suit is commenced, the procedure for commencing suit is set by the Federal Rules of Civil Procedure. Those rules govern service of process in cases brought in diversity jurisdiction. Hajjiri v. First Minnesota Sav. Bank F.S.B., 25 F.3d 677, 678 (8th Cir. 1994); Gulley, 886 F.2d at 164. Rule 4 of the Federal Rules of Civil Procedure provides that a plaintiff

may notify a defendant of the commencement of an action and request that defendant waive service of a summons. Fed. R. Civ. P. 4(d)(2). If the defendant chooses to waive service, the action shall proceed "as if a summons and complaint had been served at the time" the plaintiff files the waiver of service with the court. Id.

However, if the defendant chooses not to waive service, service has not been effected. Gulley, 886 F.2d at 164. "[T]he provisions of [Rule 4] are to be strictly complied with . . . therefore, if the acknowledgement form is not returned, the formal requirements of mail service are not met and personal service must be obtained." Gulley, 886 F.2d at 164 (citations and internal quotations omitted); Alholm, 144 F.3d at 1176 (service by certified mail ineffective when defendants did not sign and return acknowledgement of service form even though plaintiff received a return receipt and defendants had actual notice of attempted service of complaint); Hajjiri, 25 F.3d at 678 (service by mail ineffective when defendant fails to return signed acknowledgement form, even though defendant had actual notice of complaint). See also Coons v. St. Paul Cos., 486 N.W.2d 771, 774-75 (Minn. Ct. App. 1992) (same).

Rule 4 of the Federal Rules of Civil Procedure also authorizes service by mail in accordance with state law as well as the federal rules. See Fed. R. Civ. P. 4; Hajjiri, 25 F.3d at 678. Like Federal Rule 4, under Minnesota law a plaintiff may attempt to serve a defendant by mailing defendant a copy of the summons and complaint with two copies of a notice and acknowledgement of service. Minn. R. Civ. P. 4.05. However, also like Rule 4 of the Federal Rules, if the defendant does not return the acknowledgement to the plaintiff, service is ineffectual. Id. ("[I]f acknowledgement of service under this rule is not received by the sender within the time defendant is required by these rules to serve an answer, service [by mail] shall be

ineffectual."); Hajjiri, 25 F.3d at 678 ("[T]he only way mail service can be acknowledged under the federal rules or Minnesota law is by return of the enclosed acknowledgment form within twenty days of the mailing"); Coons, 486 N.W.2d at 774-75 (enforcing the Minnesota mail service rule, discussing the exacting need for compliance with the rule, and providing a caveat to practitioners about its use in the face of a claim about to become time-barred).

Here, petitioners' attempted service was ineffective under both the Federal Rules and Minnesota law. Although the end of the limitations period was approaching, petitioners chose to attempt to serve Mayo by mail, enclosing an acknowledgement of service form. In accordance with its rights under the Rules of Civil Procedure, Mayo never signed and returned the acknowledgement form. This was Mayo's exclusive prerogative. Indeed, petitioners' counsel had been told that Mayo's counsel would not cooperate in getting her client sued.

Petitioners did not effect service by mail. Instead, petitioners finally effected service on Mayo on September 8, 1998, when petitioners delivered copies of the amended summons and complaint to the Olmsted County Sheriff's Office for service, and personal service was accomplished one day later. See Minn. R. Civ. P. 3.01(c). In this diversity action, Walker mandates that the statute of limitations was not tolled by filing the complaint. A Minnesota diversity action is not commenced by filing. Petitioners did not implement the proper procedure to commence this action until September 8, 1998, more than two years from the date their alleged medical malpractice and loss of consortium causes of action accrued. The claims were time-barred. This analysis was the basis of the Eighth Circuit's decision. See Eight Circuit's Order dated July 14, 2000 ("Eighth Circuit Order") at 6. It was grounded on Walker. Id.

II. Fed. R. Civ. P. 4(m) Is Irrelevant.

Petitioners' reliance on Rule 4(m) is misplaced. Rule 4(m) merely provides that a complaint must be served within 120 days of the date it is filed. See J. Moore, Moore's Federal Practice § 4.80 (3d ed. 1998). It does not address when a lawsuit is commenced or the procedure for commencing it. The rule is irrelevant for no dispute as to whether petitioners met Rule 4(m)'s requirement exists. That petitioners may have met Rule 4(m)'s 120-day service requirement has no bearing on petitioners' failure to serve Mayo within the limitations period. If petitioners' implication that their action is timely merely because they served the complaint within 120 days of the filing date were true, any plaintiff could evade the statute of limitations by simply serving its complaint within 120 days after the complaint was filed, regardless of the length of time between the filing date and the date the claims subsequently became time-barred. Statutes of limitations would become meaningless; only Rule 4(m)'s 120-day requirement would have to be met. Rule 4(m) was not intended to vitiate all statutes of limitations. Thus, petitioners' discussion of Rule 4(m) and the cases they cite therein are irrelevant and provide no guidance. See, e.g., Hart v. Bates, 897 F. Supp. 710 (E.D.N.Y. 1995) (properly applying both state statute of limitations and federal 120-day deadline for serving complaint after complaint has been filed).

Even were Rule 4(m) somehow deemed to be relevant, it does not conflict with Minnesota's commencement rule. The Walker Court determined that a state commencement of suit rule nearly identical to Minnesota's did not conflict with the Federal Rules of Civil Procedure. See 446 U.S. at 752 ("[Each] can exist side by side, therefore, each controlling is own intended sphere of coverage without conflict.") In the absence of conflict, the

state substantive law must be followed. Id.; Eighth Circuit Order at 8.

III. A Defendant's Actual Notice of an Action Does Not Toll the Statute of Limitations.

Petitioners contend that since Mayo had actual notice of petitioners' claims before the limitations period expired, the service rules should be liberally construed so as to excuse both non-compliance and the failure to serve within the limitations period. In support of this proposition, petitioners cite cases from other circuits in which courts held that plaintiffs had timely commenced their actions even though the defendants had not signed and returned acknowledgement forms during the applicable statute of limitations. See Petition for Writ of Certiorari at pp. 15-18. However, each of these cases, Morse v. Elmira Country Club, 752 F.2d 35 (2d Cir. 1984), Kitchens v. Bryan County National Bank, 825 F.2d 248 (10th Cir. 1987), and Deshmukh v. Cook, 630 F. Supp. 956 (S.D.N.Y. 1986), was decided before Rule 4 was amended in 1993 to clarify that a statute of limitations is not tolled by a defendant's mere receipt of a complaint and acknowledgement form. To toll the statute of limitations, the form must be signed and returned. The advisory committee notes to Rule 4(d) state:

> The former text described this process as service-by-mail. This language misled some plaintiffs into thinking that service could be effected by mail without the affirmative cooperation of the defendant. E.g., Gulley v. Mayo Foundation, 886 F.2d 161 (8th Cir. 1989). It is more accurate to describe the communication sent to the defendant as a request for a waiver of formal service. . . .
>
> Paragraph (4) clarifies the effective date of service when service is waived; the

> provision is needed to resolve an issue arising when applicable law requires service of process to toll the statute of limitations. E.g., Morse v. Elmira Country Club, 752 F.2d 35 (2d Cir. 1984). Cf. Walker v. Armco Steel Corp., 446 U.S. 740 (1980).
>
> The provisions in former subdivision (c)(2)(c)(ii) of this rule may have been misleading to some parties. Some plaintiffs, not reading the rule carefully, supposed that receipt by the defendant of the mailed complaint had the effect . . . of . . . tolling the statute of limitations in actions in which service of the summons is required to toll the limitations period. The revised rule is clear that, if the waiver is not returned and filed, the limitations period under such a law is not tolled and the action will not otherwise proceed until formal service of process is effected.
>
> [T]he device of requested waiver of service is not suitable if a limitations period which is about to expire is not tolled by filing the action. Unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified [in Rule 4].

See 1993 advisory committee notes, Fed. R. Civ. P. 4 (emphasis added).

Thus, the pre-amendment cases petitioners cite from other circuits have no force subsequent to the 1993 amendment. Even if they still were viable, the Eighth Circuit rule, as it existed before and after the 1993 amendment, is contrary to these circuits. See, e.g., Alholm, 144 F.3d at 1176 (service by certified mail ineffective when

defendants did not sign and return acknowledgement of service form even though plaintiff received a return receipt and defendants had actual notice of attempted service of complaint); Hajjiri, 25 F.3d at 678 (service by mail ineffective when defendant fails to return signed acknowledgement form, even though defendant had actual notice of complaint); Gulley, 886 F.2d at 164 ("[T]he provisions of [Rule 4] are to be strictly complied with . . . therefore, if the acknowledgement form is not returned, the formal requirements of mail service are not met and personal service must be obtained."). This analysis, too, was the basis of the Eighth Circuit's decision on this issue. Eighth Circuit Order at 6-7.

IV. Petitioners Did Not Effect Service Under Fed. R. Civ. P 4(h) or Minn. R. Civ. P. 4.05.

Petitioners argue, in two sentences, that they timely served Mayo in accordance with Fed. R. Civ. P. 4(h), which authorizes service on a corporation by personally serving an "officer, a managing or general agent, or . . . any other agent authorized by appointment or by law to receive service of process . . . ." Petition for Writ of Certiorari at p. 20. Two problems exist with this assertion. First, the complaint was not personally served on anyone at Mayo during the limitations period; the only attempted service during that time was by mail. Second, the complaint was not even mailed to an officer, managing or general agent or anyone else at Mayo authorized to accept service. It was addressed to "Medical/Legal Department, Mayo Clinic."

Petitioners also claim that service was timely under Minn. R. Civ. P. 4.05, which, like Fed. R. Civ. P. 4, authorizes service by mail if the defendant signs and returns

an acknowledgement of service.[2] Minn. R. Civ. P. specifically states, "If acknowledgement of service under this rule is not received by the sender within the time defendant is required by these rules to serve an answer, service shall be ineffectual." See Minn. R. Civ. P. 4.05. Despite the Rule's explicit language, petitioners contend that, under the Rule, the defendant need not actually return the acknowledgement for service to be effective. Petitioners are wrong.

Once again, petitioners' argument is based on questionable precedent. Specifically, petitioners rely on Manypenny v. United States, 125 F.R.D. 497 (D. Minn. 1989), in which the court held that service by mail was effective even though the defendant did not return an acknowledgement of service form. However, in a subsequent decision, Coons, 486 N.W.2d at 774, the Minnesota Court of Appeals, interpreting its own rules, held that "[b]y the plain language of [Rule 4.05] and [the Rule's] advisory note, service upon appellant was ineffectual because appellant never returned the acknowledgement of service forms as required for effective service under the rule." Id. at 774. The court stated:

> Nor are we persuaded by the [lower] court's reliance upon Manypenny, where the court, relying on Stonewall, applied principles of personal service to find effective service by mail. The Manypenny court followed the one federal circuit that adopted the minority liberal interpretation of the service of process rule. Manypenny, 125 F.R.D. at 500

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[2] Fed. R. Civ. P. 4 authorizes service by mail in accordance with state law as well as the federal rules. See Fed. R. Civ. P. 4. That petitioners' argument is an unsupported afterthought is evidenced by the federal acknowledgement as opposed to state acknowledgement form sent to Mayo. Only if the latter had been used would petitioners have been proceeding under Minn. R. Civ. P. 4.05.

> (applying rule of Lee v. Carlson, 645 F. Supp. 1430, 1432 (S.D.N.Y. 1986), aff'd mem, 812 F.2d 712 (2d Cir. 1987) (following precedent set by Morse v. Elmira Country Club, 752 F.2d 35, 41 (2d Cir. 1984))). Further the Manypenny court did not cite [Young v. Hawley Ins. Co., 864 F.2d 81, 82 (8th Cir. 1988),] an Eighth Circuit case which specifically addressed the issue of service of process by mail. To the extent that Manypenny adopted the minority federal interpretation of the service by mail rule and disregarded Young, its ruling is of doubtful continuing validity, especially in view of the Eighth Circuit's subsequent decision in Gulley, 886 F.2d at 165.

Id. at 776. Also important is the fact that the district court opinion in Manypenny was rendered prior to the Eighth Circuit opinions in Alholm, 144 F.3d 1172, Hajjiri, 25 F.3d 677, and Gulley, 886 F.2d 161, all of which reached a contrary holding interpreting the counterpart federal rule.

CONCLUSION

Petitioners would have this Court overrule Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980). No reason exists for doing so. The Walker analysis, grounded in Erie v. Tompkins principles, remains most appropriate. All circuits follow it. Re-examination of it is not warranted. Further, petitioners would have this Court nullify the words and intent of Rule 4(d) of the Rules of Civil Procedure. Here again, no reason exists for doing so.

Respectfully submitted,

Leo G. Stern
FREDRIKSON & BYRON, P.A.
1100 International Centre
900 Second Avenue South
Minneapolis, MN 55402
(612) 347-7000

OF COUNSEL:

Trudi Noel Trysla
200 First Street Southwest
Rochester, MN 55905
(507) 284-8291
(507) 284-0929 (Fax)